

The Honorable Benjamin H. Settle

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON AT TACOMA

JOHN DOE #1, an individual, JOHN DOE #2, an
individual, and PROTECT MARRIAGE
WASHINGTON,

Plaintiffs,

v.

SAM REED, in his official capacity as Secretary of
State of Washington, BRENDA GALARZA, in her
official capacity as Public Records Officer for the
Secretary of State of Washington,

Defendants.

No. 09-cv-05456-BHS

WASHINGTON COALITION FOR OPEN
GOVERNMENT'S MOTIONS IN LIMINE

NOTE ON MOTION CALENDAR:

September 9, 2011

I. MOTION

COMES NOW the Washington Coalition for Open Government ("WCOG"), pursuant to Local Rule 7(d)(4), and makes the following motions in limine to exclude certain testimony and documents from inclusion in the trial. WCOG also joins the State of Washington and Washington Families Standing Together in their motions in limine.

- A. **Testimony and documents purporting to describe threats, harassment or reprisals where the alleged conduct did not involve words or conduct that placed the person allegedly threatened in a reasonable fear that the threat would be carried out.**

In this case, Plaintiffs must establish, through admissible evidence and not conjecture, "a reasonable probability that the compelled disclosure [of personal information] will subject them to

WASHINGTON COALITION FOR OPEN
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WITHERSPOON • KELLEY

Attorneys & Counselors

422 W. Riverside Avenue, Suite 1100 Phone: 509.624.5265
Spokane, Washington 99201-0300 Fax: 509.458.2728

1 threats, harassment, or reprisals from either Government officials or private parties." *Doe v. Reed*,
 2 130 S. Ct. 2811, 2820 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 74 (1976)). The words
 3 "threats," "harassment" and "reprisals" all have a connotation of a communicated "threat" and a
 4 present ability for that threat to be carried out. Evidence of mere threats, harassment and/or
 5 reprisals without a reasonable belief that they could be acted upon should be excluded.

7 Under Washington law, harassment is a criminal offense. See RCW 9A.46.020. In order to
 8 be harassment, the person receiving the alleged threat must show that "[t]he person by words or
 9 conduct places the person threatened in reasonable fear that the threat will be carried out." RCW
 10 9A.46.020(1)(b). Mere words, without a reasonable anticipation of action, do not rise to the level
 11 of felony harassment under Washington law. In this case, statements that do not meet
 12 Washington's harassment standard should not be admitted because they are not probative of any
 13 fact that the Plaintiffs must establish, and their prejudicial value and the likelihood of confusing the
 14 issues outweighs any probative value. Fed.R.Evid. 403.

17 **B. Testimony and documents purporting to describe threats, harassment or reprisals**
 18 **where the alleged evidence consists of vituperative, abusive and/or inexact language**
 19 **and there is no reasonable anticipation that the threat will be acted on.**

20 In the case of *Watts v. United States*, 394 U.S. 705, 707 (1969), the Supreme Court wrote
 21 that "what is a threat must be distinguished from what is constitutionally protected speech." In
 22 *Watts*, Robert Watts, a young person attending a police brutality rally in Washington, D.C.,
 23 remarked that "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J."
 24 *Id.* at 706. The District Court and Court of Appeals convicted Robert Watts of making threats
 25 against the President. The Supreme Court overturned the lower courts, holding that "language of
 26 the political arena...is often vituperative, abusive and inexact," but that Mr. Watts' language,
 27 although offensive, did not rise to the level of a threat. *Id.* at 708.



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Attorneys & Counselors

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Here, the Plaintiffs' evidence of inexact and crude language should not be admitted because it does not rise to the level of a "threat" as the Supreme Court has defined that term and as that conduct is defined in Washington's anti-harassment laws.

C. Testimony and documents purporting to describe threats, harassment or reprisals where the party offering the evidence has acted in a method, manner or practice such that a reasonable person acting in the same method, manner or practice could reasonably anticipate criticism and/or reaction against the beliefs expressed, whether the criticism and/or reactions were public or private.

Much of Plaintiffs' evidence and testimony comes from public figures and spokespeople for the Referendum 71 campaign. Outside of their direct work in support of placing R-71 on the ballot, many of Plaintiffs' witnesses made repeated and public statements in support of traditional marriage. Many of these speakers either anticipated or reasonably could have anticipated that others might disagreed with their views and express that disagreement. These persons who sought out criticism based upon their out-spoken and public support of traditional marriage do not adequately and properly represent the run-of-the-mill petition signer whose support is limited to one signature amongst 138,000 others. Therefore, the testimony of Plaintiffs' witnesses whose conduct, spoken words or other advocacy on behalf of traditional marriage or Referendum 71 invited criticism is not relevant, and the probability of unfair prejudice or confusion of the issues outweighs any probative value. Fed.R.Evid. 403.

II. CERTIFICATION OF COMPLIANCE

Prior to filing this motion, on Friday, August 19, 2011, WCOG, in good faith, conferred with other affected parties in an effort to resolve which matters really are in dispute.

III. CONCLUSION

For the reasons stated herein, the above-referenced testimony should not be admitted by the Plaintiffs during the trial in this matter.



1 DATED this 22nd day of August, 2011.

2 WITHERSPOON • KELLEY

3
4 /s/ Steven J. Dixon, WSBA #38101

5 DUANE M. SWINTON, WSBA NO. 8354

6 LESLIE R. WEATHERHEAD, WSBA NO. 11207

7 STEVEN J. DIXSON, WSBA NO. 38101

8 Counsel for Intervenor Washington Coalition for Open
9 Government



CERTIFICATE OF SERVICE

1
2 I, Steven J. Dixon, am a citizen of the United States and a resident of the State of
3 Washington. I am over the age of 18 years and not a party to the within action. I am employed
4 by the law firm of Witherspoon · Kelley, P.S., 422 W. Riverside Avenue, Suite 1100, Spokane,
5 Washington.
6

7 2. On the 22nd day of August, 2011, I caused to be served upon the parties via
8 electronic mail, the Washington Coalition for Open Government's Motions in Limine, on the
9 following:
10

11 James Jr. Bopp, jboppjr@aol.com
12 Joseph E. LaRue, jlarue@bopplaw.com
13 Stephen Walter Pidgeon, stephen.pidgeon@comcast.net
14 Jared M. Haynie, jhaynie@bopplaw.com
15 Anne E. Egeler, anneel@atg.wa.gov
16 Jay Geck, jayg@atg.wa.gov
17 William Clark, billc2@atg.wa.gov
18 Kevin J. Hamilton, khamilton@perkinscoie.com
19 William B. Stafford, wstafford@perkinscoie.com
20 Ryan McBrayer, rmcbrayer@perkinscoie.com
21 Nicholas Gellert, ngellert@perkinscoie.com
22

23 I declare under penalty of perjury under the laws of the State of Washington that the
24 foregoing is true and correct.
25

26 /s/ Steven J. Dixon
27 Steven J. Dixon, WSBA #38101
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